that the heir is not to be disinherited except by plain words, a presumption which had never been referred to in any of the cases that had risen under similar facts. The Court did not refer to the rule as it had been decided, by the Pennsylvania decisions, but, apparently closing its eyes to all precedent cases, decided the case as if it had been *res nova*.

G. H. C.

INJUNCTION—STRIKE FOR CLOSED SHOP.—The problem of the use of the injunction in cases generally classified as cases of strikes and boycotts has been treated in most jurisdictions as a problem of equity jurisdiction over TORTS. If equity is to consider taking jurisdiction over a tort it must, of necessity, be satisfied that the facts alleged in the bill make out a tort threatened or continued by the respondent. This was the first battle ground of the law in cases of this character and the conflict ended in nearly complete overthrow of the doctrine of absolute rights. From earliest times the right of a man to engage in business, to have labor or custom flow freely to him was recognized as a right of which an infringement by violence or threat was ground for an action on the case.[1] Whether the subsequent recognition of this right as a property right which equity would protect was an extension of the limits of what the law calls property, or a virtual abrogation of the maxim that "equity protects only property" is immaterial. It is sufficient that the right was well established as a property right when the first cases of boycott by economic pressure arose. The question presented in these cases was one of some nicety for in their pure form the infringement of the plaintiff's right freely to deal is occasioned by the exercise of the same right in the defendant. In the typical case where A refuses to deal with B if B deals with C, before the decision of Walker and Cronin,[2] the American cases took the position that C's right to deal or refuse to deal being an absolute right he was not liable for any injury resulting from the exercise of that right;[3] and even later, in England, the theory of absolute rights prevailed.[4] The statement of law found in Walker and Cronin[5] is an expression of the theory which is the foundation of the doctrine of relative rights. "Any act the natural result of which is an injury to a particular person, knowingly done by one person, and resulting in injury to the other, renders the

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[1] Garrett v. Taylor, Croke James Rep. 567 (1620); Tarleton v. McGawley, 1 Peake, 205 (1793).

[2] 107 Mass. 555 (1871).

[3] Orr v. Ins. Co., 12 La. Ann. 255 (1857); Bowen v. Matheson, 96 Mass. 499 (1867).

[4] Allen v. Flood, A. C. 1 (1898); Huttley v. Simmons (1895), 67 L. J. O. B. 213. But see Quinn v. Teatham (1901), A. C. 495.

[5] 107 Mass. 555 (1871).

actor liable to the injured person, unless the actor has a just cause and excuse." It is unfortunate that the courts in applying this doctrine to trade and labor cases have seen fit to re-state it and lay down the proposition that a purely malicious motive can in these cases make an act otherwise legal, illegal. It will be seen that the propositions are essentially the same and it must be considered unfortunate that the presentation favored by the courts, makes motive the determining element in the question of the defendant's civil liability.

While it is true that the generally accepted authority now is that a refusal to deal, either with malice, or without justification, is a tort to the person necessarily injured thereby,[6] there are many cases to be found which appear in conflict.[7] The writer submits that these apparent conflicts are due not to conflicting theories of the law but to the different economic aspects of the cases. Thus a court finds it impossible to see a justification for a refusal to deal by a labor union boycotting capital[8] and yet can find lawful justification for the defendant in similar cases where the parties are reversed.[9]

If, in a given case it be established that the acts are a tort the question of equity jurisdiction is comparatively simple. On account of uncertain or irreparable damages the remedy at law is always inadequate and the injunction will issue unless it is prevented by one of the fundamental limitations of equitable remedy. The limitations which most frequently make the injunction impossible in these cases are that equity will not order one man to do personal service for another; and that equity will not prohibit free speech (*i. e.*, the free expression of *ideas*).

In the recent New York case of Schwartz v. International Ladies' Garment Workers' Union, *et al.*,[10] a federation of trade unions struck in all the shops of the members of a manufacturers' association for the purpose of obtaining from the employers, members of this association, an agreement for closed shops. Some physical injury to the employers' property was shown and many acts of violence to employees who refused to quit work. The association of employers filed a bill in equity and secured an injunction against all violence and apparently against even peaceful picketing on the ground that it was in aid of an unlawful object. A study of the opinions in this case and of the cases cited leads to the conclusion that the courts of New York determine the question of the legality of strikes for a closed shop on a theory peculiar to that jurisdiction. Under the general law discussed above the facts would have made out a tort to any non-union laborer who lost employment because of the strike, or a tort to the employers in that the respondents by violence interfered with their

[6] Moores v. Bricklayers' Union, 23 Ohio Weekly Law Bulletin, 48 (1899).
[7] Raycroft v. Taynor, 68 Vt. 219 (1896).
[8] 124 N. Y. S. 968.

right to have labor flow freely to them. As the bill was brought by the employers of course the Court could not consider the case in its aspect of a tort to non-union workmen, but it did not even in the strict sense consider it as a tort to the employers. The case seems to have gone on the ground that an agreement between substantially all the employers in the borough and the respondent union to employ none but union men would have been against public policy and illegal because it would have forced all workmen of a certain class to join the union or lose their chance of employment. This being true the acts of the respondent union in trying to force the complainants into such a contract were acts to accomplish an illegal object and therefore a common law civil conspiracy, and illegal.

It would appear that this theory has been at least one of the grounds for the decision of all the cases of this class in New York. In Curren v. Galen[9] there was threat of strike and an action for damages by a discharged non-union employee. The defence was a contract with an employers' association for the employment of only union labor. The association included practically all the employers of that class of labor in the city and the plaintiff recovered on the ground that the contract, being illegal, was no defence. If it were not for the subsequent cases it might be argued that the conclusion in this case was reached by the same reasoning which would have led to it in other jurisdictions. One paragraph in the opinion, however, and its subsequent interpretation and application by the court leads to the other conclusion. "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict that freedom, and through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of their employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges."

National Protective Association v. Cumming[10] was a case of a threat to strike by the defendant union causing discharge of the members of the plaintiff's union. There was no contract between the defendant union and the employer and only one place of employment was concerned and the plaintiffs failed to recover damages. Parker, P. J., places his decision on two grounds: First, "that the defendants had a right to strike for

[9] 152 N. Y. 33 (1897).
[10] 170 N. Y. 315 (1902).

any reason they deemed a just one, and further had a right to notify their employer of their purpose to strike"; and second, "even if it be admitted that motive could affect the legality of their acts, the motive here was justifiable and not malicious." Vann, J., in a dissenting opinion argues for the adoption of the rule general in other jurisdictions which would permit recovery here.

The Court of Appeals in Jacobs v. Cohen [11] held legal a contract between a single employer and a union for a closed shop, while only three years later the same Court affirmed the Supreme Court's decision in McCord v. Thompson-Stanets Co., which held an agreement by a borough-wide association of employers to employ only carpenters who were members of a certain union, illegal and void. Scott, J.: "This (the illegality of the agreement) seems to be established by the opinion of the Court of Appeals in Curren v. Galen, *supra,* re-affirmed and explained by Jacobs v. Cohen, *supra.* In the latter case Judge Gray, writing for the court, makes it quite clear that while an individual employer may lawfully agree with a labor union to employ only its members, because such agreement is not of an oppressive nature operating generally throughout the community to prevent craftsmen in the trade from obtaining employment and earning their livelihood, yet such an agreement when participated in by all or by a large proportion of employers in any community becomes oppressive and contrary to public policy, because it operates generally upon the craftsmen in the trade, and imposes on them as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."

The New York doctrine would seem then to be, that while the right to refuse to deal is not an absolute right its exercise is more readily justified than under the general rule, but that its use for the purpose of forcing all workmen in a given community to join a union or be deprived of the chance of employment is illegal on grounds of public policy. In view of the decision in National Protective Association v. Cumming (*supra*) and of the interpretation of Curren v. Galen (*supra*), in McCord v. Thompson-Stanett Co. (*supra*) it is submitted that a refusal to deal with the purely malicious motive to injure another could not, consistently with the decided cases, be held illegal unless the scheme was borough-wide. It would also appear that when such a scheme is borough-wide it will be restrained at the petition of any person who would be injured by its success.

The case is more interesting in what it suggests than in what it actually decides. It would seem hard to defend the proposition that the fact that the respondents conspired to force the complainants to make the illegal contract with them made acts a tort which would not have been a tort in the absence of such conspiracy. There are, however, cases which seem rather to assume this proposi-

[11] 183 N. Y. 207 (1905).

tion than to lay it down.[12] As to the injunction the words of the Court are ambiguous and it is impossible to tell whether or not peaceful picketing was retrained because in aid of an illegal object. Under these circumstances such picketing would undoubtedly be a tort, but it would seem equity could never restrain it owing to the constitutional provisions in regard to free speech. Cases can, however, be found where the order issued by the Court does seem to restrain peaceful argument,[13] but it cannot be said that this view has made any permanent place for itself in the law.

F. L. B.

[12] Blindell v. Hagan, 54 Fed. 40, 1893; affirmed in Hagan v. Blindell, 56 Fed. 696, C. C. A. 1893; Elder v. Whitesides, 72 Fed. 724, 1895; City v. Produce Exchange, 48 L. R. A. 90 (1900).

[13] Knudsen v. Benn, 123 Fed. 636 (1903).